BANK PERTANIAN MALAYSIA BHD v. MAPLE AMALGAMATED SDN BHD (IN LIQUIDATION)

HIGH COURT MALAYA, IPOH
HASHIM HAMZAH J
[ORIGINATING SUMMONS NO: AA-2AF-526-06-2017]
19 NOVEMBER 2019

CIVIL PROCEDURE: *Judgments and orders – Direction – Foreclosure proceedings – Auction of land – Deputy Registrar of High Court gave direction and fixed auction date of land – Whether direction 'judgment', 'order' or 'decision' – Whether direction 'decision' defined under s. 3 of Courts of Judicature Act 1964 – Whether appealable – Whether direction finally disposed of rights of parties – Whether direction made in course of trial, hearing or any cause or matter – Whether Arahan Amalan Pendaftar Mahkamah Tinggi Malaya Bil 1 Tahun 2017 applicable – Whether non-compliance to practice direction would cause prejudice or would result in any substantial miscarriage of justice*

The plaintiff had granted the *al bai bithaman ajil* facility ('facility') to the defendant, for the purchase of a piece of land, and to give effect to the facility, the defendant charged the land in favour of the plaintiff. However, the facility was later terminated when the defendant defaulted in its repayment. The plaintiff commenced foreclosure proceedings, at the High Court, and successfully obtained an order for sale of the land. The defendant appealed against the decision to the Court of Appeal ('Appeal 1318') and applied to stay the order for sale but both the appeal and the application for stay were dismissed. The defendant thus applied for leave to appeal to the Federal Court and obtained an order for stay of the decision in Appeal 1318 (order for stay dated 12 June 2019') pending the disposal of the application for leave to appeal to the Federal Court. However, the Federal Court dismissed the defendant's application for leave and consequently, the defendant's stay order lapsed. The plaintiff then filed an application for the execution of the said order for sale and sought, *inter alia*, to fix an auction date and a reserve price for the land. The High Court ordered, among others, for the land to be auctioned off on 13 June 2019 at a reserved price of RM117,000,000 ('the order'). The defendant appealed against the said order to the Court of Appeal ('Appeal 714'). The defendant also filed an application for stay of execution of the order pending the disposal of Appeal 714 but the application was dismissed. Due to the order for stay dated 12 June 2019, the auction of the land did not take place. When the Federal Court dismissed the defendant's application for leave to appeal, the plaintiff informed the High Court that the order for stay dated 12 June 2019 was no longer in effect and the land could be auctioned off. On 17 September 2019, the Deputy Registrar of the High Court gave a direction in which a new auction date of the land was fixed on 17 October 2019 ('17 September direction'). Hence, the present appeal against the direction to the judge-in-chambers. The issues that arose for

adjudication were (i) whether the 17 September direction was an appealable judgment, order or decision; and (ii) whether the Arahan Amalan Pendaftar Mahkamah Tinggi Malaya Bil 1 Tahun 2017 ('the 2017 Practice Direction') was applicable to this case and whether any non-compliance had prejudiced the defendant or had resulted in any substantial miscarriage of justice against the defendant.

Held (dismissing):

(1) Only the term 'decision' is defined under s. 3 of the Courts of Judicature Act 1964 ('CJA'). There is no definition of the terms 'judgment' and 'order' in the CJA and the Rules of Court 2012 ('ROC'). Based on the approach taken in *Teoh Poh Keong Sdn Bhd v. Shinhan Engineering & Construction Co Ltd*, the term 'judgment', 'order' and 'decision' should be read conjunctively. For a judgment, order or decision to be appealable, pursuant to O. 56 r. 1(1) of the ROC, the said judgment, order or decision must be that which finally dispose of the rights of the parties and it must not be any ruling made in the course of a trial, hearing or any cause or matter. The 17 September direction was not a judgment, order or decision which finally disposed of the rights of the parties. The rights and liabilities of the parties were determined during the foreclosure proceedings and the appeals emanating from it. The main purpose of the 17 September direction was to proceed with the auction of the land, pursuant to the order, which did not take place on the earlier designated date due to the order for stay dated 12 June 2019. This appeal was incompetent and should be dismissed on this basis alone without even going to the merits. (paras 36, 37, 39, 41 & 42)

(2) A practice direction is only a direction for administrative purposes. The non-compliance of the 2017 Practice Direction did not cause any substantial miscarriage of justice and did not prejudice the defendant in any way because (i) the substantial issues regarding the rights and liabilities of the parties *via* the foreclosure proceedings were determined by the courts up until the Federal Court. In fact, the Court of Appeal and the Federal Court did not quash the order for sale which was previously granted; (ii) the defendant no longer had any avenue to dispute or raise any issues which could potentially affect its rights which had been litigated. Any attempt by the defendant to raise any issue which had been litigated and should have and could have been brought in the proceedings before this would, naturally, be estopped by the principle of *res judicata*; and (iii) the court has the power to make other orders after the making of an order for sale. An order for a change in the reserve price, or a change in the action sale dates, are only consequential to the order for sale which was already final. Even if the plaintiff is to file a fresh application, the only matter for this court's

determination would be the fixing of a new auction date. Other ancillary directions in the order, such as the reserve price of the land, would be maintained as the said order had never been enforced. (paras 49, 52-55, & 57)

(3) In the overall interest of justice, the plaintiff's non-compliance with the 2017 Practice Direction did not cause any substantial miscarriage of justice and did not prejudice the defendant. The 17 September direction had been rightly issued by the Deputy Registrar and therefore, affirmed. Should the 17 September direction be quashed for technical compliance on the part of the plaintiff, it would open the door for abuse of the court's process. The defendant may keep on filing appeals and applications for stay of execution in each application for directions obtained by the plaintiff which had been done prior to this. As a result of any appeal or application for stay of execution which may be subsequently filed by the defendant or allowed by the courts, the auction of the land could not proceed. Is the plaintiff then required to file a fresh application for directions each and every time just to fix a new auction date? The answer should be in the negative. It was clear that the inherent powers of the court was to prevent any injustice and to prevent any abuse of the process of the court. The court shall not tolerate any abuse of the court's process under such circumstances. (paras 58 & 59)

Case(s) referred to:

Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd [2002] 1 CLJ 645 FC ***(refd)***

MUI Bank Bhd v. Cheam Kim Yu [1992] 4 CLJ 2229; [1992] 1 CLJ (Rep) 222 SC ***(refd)***

OCBC Bank (Malaysia) Bhd v. Lim Hock Kok & Anor [2017] 9 CLJ 454 CA ***(refd)***

OCBC Bank (Malaysia) Bhd v. Stephen Hansford Sales (M) Sdn Bhd & Ors And Another Suit [2004] 1 CLJ 51 HC ***(refd)***

Ooi Bee Tat v. Tan Ah Chim & Sons Sdn Bhd & Anor and Another Appeal [1995] 4 CLJ 484 CA ***(refd)***

Perwira Affin Bank Bhd v. Tan Ah Tong [2003] 2 CLJ 320 HC ***(refd)***

Re Abu Bakar PC Kuaya; Ex Parte Navaratnam Sivasamboo [2002] 6 CLJ 381 HC ***(refd)***

Takang Timber Sdn Bhd v. Syarikat Tingan Lumber Sdn Bhd [2001] 7 CLJ 641 HC ***(refd)***

Teoh Poh Keong Sdn Bhd v. Shinhan Engineering & Construction Co Ltd [2001] 2 CLJ 440 HC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964 s. 3
Interpretation Acts 1948 and 1967, s. 21(1)
Rules of Court 2012, O. 1A, O. 56 rr. 1(1), O. 92 r. 3B, 4

For the plaintiff - Ratha Govindasamy; M/s Skrine
For the defendant - Ravenesan Sivanesan; M/s S Ravenesan

Reported by Najib Tamby

A

JUDGMENT

Hashim Hamzah J:

Introduction

[1] This is the hearing of the defendant's appeal to the judge-in-chambers B ("encl. 73") against the direction given by the learned Deputy Registrar of this High Court on 17 September 2019 (hereinafter referred to as "17 September 2019 direction").

Brief Facts

C *Background Facts*

[2] Upon the defendant's request, the plaintiff had granted a financing facility to the defendant under the *al bai bithaman ajil* principle in accordance with the Syariah law pursuant to the terms and conditions stated thereunder (hereinafter referred to as "the BBA financing facility") for the purchase of D a piece of land held under PN 362666 (formerly known as H.S. (D) 20109), Lot 11445, Mukim Durian Sebatang, Perak Darul Ridzuan (hereinafter referred to as "the said land"). In order to give effect to the granting of the BBA financing facility, the plaintiff and the defendant had executed the following security documents (hereinafter collectively referred to as "the E security documents"), namely:

(i) letter of offer dated 18 June 2008;

(ii) asset purchase agreement dated 24 June 2008;

(iii) asset sale agreement dated 24 June 2008; and

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(iv) supplementary agreement dated 25 July 2008.

[3] Pursuant to the terms of the security documents, the defendant registered a valid first charge on the property in favour of the plaintiff on 3 January 2011 *via* charge presentation No. 44692/211 (hereinafter referred G to as "the said charge").

[4] Due to the defendant's default in the repayment of the financing facility to the plaintiff, the plaintiff had duly terminated the BBA financing facility based on the terms of the security documents.

H *The Foreclosure Proceeding*

[5] The plaintiff filed an action for an order for sale of the said land at the Ipoh High Court *via* Originating Summons No: AA-24FC-526-06-2017 (hereinafter referred to as "the said foreclosure proceeding"). The plaintiff had successfully obtained an order for sale of the said land on 18 May 2018 I (hereinafter referred to as "the said order for sale").

[6] On 14 June 2018, the defendant filed an appeal to the Court of Appeal against the said order for sale *via* Appeal No. A-02(A)-1318-06-2018 (hereinafter referred to as "the 1318 Appeal").

[7] At the same time, the defendant filed an application at the Ipoh High Court for a stay of execution of the said order for sale pending the disposal of the 1318 Appeal. The said application was dismissed by this court on 16 January 2019.

[8] On 18 April 2019, the Court of Appeal dismissed the 1318 Appeal. On 16 May 2019, the defendant filed a notice of motion for leave to appeal to the Federal Court against the Court of Appeal's decision in the 1318 Appeal *via* Application No: 08(f)-204-05-2019(A).

[9] On 17 May 2019, the defendant filed an application at the Court of Appeal for stay of the Court of Appeal's decision in the 1318 Appeal pending the disposal of the defendant's application for leave to appeal to the Federal Court, and if allowed, the disposal of the defendant's appeal in the Federal Court. On 12 June 2019, the Court of Appeal allowed the defendant's application (hereinafter referred to as "the Court of Appeal's order for stay")

[10] However, on 22 August 2019, the Federal Court dismissed the defendant's application for leave and consequently, the defendant's stay order had lapsed.

The Summons For Directions

[11] Pursuant to the said order for sale, the plaintiff had, on 13 June 2018, filed this application, ie, Originating Summons No. AA-38-368-06-2018, for the execution of the said order for sale. In this application, the plaintiff sought, among others, to fix an auction date and to fix a reserve price for the said land (hereinafter referred to as "the said summons for directions proceeding").

[12] On 13 March 2019, after hearing the plaintiff's application, this court had ordered, among others, for the said land be auctioned off on 13 June 2019 at a reserved price of RM117,000,000 (hereinafter referred to as "the said order").

[13] On 10 April 2019, the defendant filed an appeal against the said order to the Court of Appeal *via* Appeal No. A-02(IM)-714-04-2019 (hereinafter referred to as "the 714 Appeal").

[14] On 9 May 2019, the defendant filed an application for stay of execution of the said order pending the disposal of the 714 Appeal. This application was dismissed by this court on 11 June 2019.

[15] Due to the Court of Appeal's order for stay which was granted on 12 June 2019, the auction of the said land which was fixed on 13 June 2019 pursuant to the said order did not take place.

[16] On 22 August 2019 ie, on the same day the Federal Court had dismissed the defendant's application for leave to appeal to the Federal Court, the plaintiff wrote to the Ipoh High Court stating that the Court of Appeal's order for stay was no longer in effect and the said land can be auctioned off.

[17] On 17 September 2019, the learned Deputy Registrar of this High Court gave 17 September 2019 direction in which a new auction date of the said land was fixed on 17 October 2019.

[18] On 24 September 2019, the defendant filed this appeal to the judge-in-chambers against 17 September 2019 direction.

Other Suits

[19] During the course of the said foreclosure proceedings and the said summons for directions proceeding, the defendant had filed two other suits against the plaintiff in the Ipoh High Court.

[20] The defendant filed Suit No. AA-24NCvC-343-08-2017 to set aside the charge but it was withdrawn by the defendant on the day it was fixed for decision on 16 November 2017.

[21] The defendant also filed Suit No. AA-24NCvC-227-06-2018 to invalidate, among others, the security documents and the said charge. In the same suit, the defendant filed an application for injunction to prevent the plaintiff from enforcing the security documents and the said charge. The defendant's application for injunction was dismissed by this court on 26 November 2018. Dissatisfied with the decision, the defendant on 29 November 2018 filed an appeal to the Court of Appeal *via* Appeal No. A-02(IM)(NCvC)-2444-12-2018 against the dismissal of its application for injunction.

[22] On 5 December 2018, the defendant filed an application in the Court of Appeal to stay the Suit No. AA-24NCvC-227-06-2018 proceeding and the enforcement of the security documents pending the disposal of Appeal No. A-02(IM)(NCvC)-2444-12-2018 at the Court of Appeal.

[23] On 13 March 2019, this court dismissed the defendant's suit in Suit No. AA-24NCvC-227-06-2018 and the defendant later filed an appeal to the Court of Appeal *via* Appeal No: A-02(NCvC)(A)-553-03-2019.

[24] On 28 March 2019, the Court of Appeal struck out Appeal No: A-02(IM)(NCvC)-2444-12-2018 and the defendant's application for stay.

[25] On 29 March 2019, the defendant filed an application in the Court of Appeal under Appeal No: A-02(NCvC)(A)-553-03-2019 to stay the enforcement of the security documents and the said charge but it was later dismissed by the Court of Appeal on 26 April 2019. The appeal is fixed for hearing on 21 November 2019.

[26] On 24 September 2019 ie, on the same day the defendant filed this appeal to the judge-in-chambers, the plaintiff's solicitors were served with an unsealed originating summons which was filed by the defendant in the Ipoh High Court to set aside the 17 September 2019 direction *via* Suit No: AANCvC-409-09-2019 which was fixed on 1 October 2019. The plaintiff's solicitors were later informed that the defendant's solicitors had filed a notice of discontinuance for the said action.

[27] On 26 September 2019. The defendant filed another originating summons at Kuala Lumpur High Court *via* Originating Summons No. WA-24NCvC-2019-09-2019 which was identical to Suit No. AANCvC-409-09-2019 filed in the Ipoh High Court which was purported to set aside the 17 September 2019 direction.

[28] On the same day ie, on 26 September 2019, the defendant also filed an application for stay of the 17 September 2019 direction pending the disposal of the defendant's application in Originating Summons No: WA-24NCvC-2019-09-2019. This application was dismissed by the Kuala Lumpur High Court on 9 October 2019.

[29] On 1 October 2019, the defendant filed an application in the Court of Appeal for stay of 17 September 2019 direction pending the disposal of the 714 Appeal and the Originating Summons No: WA-24NCvC-2019-09-2019.

[30] Both the 714 Appeal and the Originating Summons No: WA-24NCvC-2019-09-2019 were fixed for hearing on 13 February 2020 at the Court of Appeal.

Issues In This Appeal

[31] Briefly, the main issues raised in the present appeal were as follows:

(i) whether the 17 September 2019 direction is a judgment, order or decision that is appealable; and

(ii) whether the Arahan Amalan Pendaftar Mahkamah Tinggi Malaya Bil. 1 Tahun 2017 (hereinafter referred to as "the 2017 Practice Direction") is applicable to this case and whether any non-compliance thereto has prejudiced the defendant or has resulted in any substantial miscarriage of justice against the defendant.

First Issue: Whether 17 September 2019 Direction Is A Judgment, Order Or Decision That Is Appealable

[32] First and foremost, O. 56 r. 1(1) of the Rules of Court 2012 ("hereinafter referred to as "ROC 2012") provides that:

> An appeal shall lie to a Judge in Chambers from any judgment, order or decision of the Registrar of the High Court.

[33] There is no definition of 'judgment', 'order' and 'decision' in ROC 2012. In interpreting the terms under O. 56 r. 1(1) of the ROC 2012, reference is made to s. 21(1) of the Interpretation Acts 1948 and 1967 which states that:

> Terms and expressions used in subsidiary legislation have the same meaning as in the written law under which the subsidiary legislation was made.

[34] The interpretation of the term 'decision' can be found under s. 3 of the Courts of Judicature Act 1964 (hereinafter referred to as "CJA 1964"), which is the parent Act of the ROC 2012. Under the preamble of the ROC 2012, it can be seen that:

> IN exercise of the powers conferred by section 17 of the Courts of Judicature Act 1964 [Act 91] and section 4 of the Subordinate Courts Rules Act 1955 [Act 55], and with the consent of the Chief Judge of the High Court in Malaya and the Chief Judge of the High Court in Sabah and Sarawak, the Rules Committee and the Subordinate Courts Rules Committee make the following rules:

[35] Section 3 of the CJA 1964 defines 'decision' as follows:

> 'decision' means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties.

[36] At this point, it can be seen that only the term 'decision' is defined under s. 3 of the CJA 1964. There is no definition of the term 'judgment' and 'order' in both the CJA 1964 and the ROC 2012.

[37] On this issue, I adopt the approach taken by Richard Malanjum J (as he then was) in the case of *Teoh Poh Keong Sdn Bhd v. Shinhan Engineering & Construction Co Ltd* [2001] 2 CLJ 440; [2001] 2 MLJ 50 that the term 'judgment', 'order' and 'decision' should be read conjunctively. The following is observed:

> Now s. 3 of the CJA, as amended, defines the word "decision" thus:
>
> 'decision' means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties;
>
> And O. 56 r. 1 of the Rules of the High Court 1980 ('RHC') provides:
>
> > 1. Appeals from certain decisions of registrar to judge in chambers. (O. 56 r. 1)
> >
> > (1) An appeal shall lie to a judge in chambers from **any judgment, order or decision** of the registrar. (emphasis added).
>
> At a glance, it is obvious that it is not only the word 'decision' that appears in the said order, but that it is preceded by the words 'judgment' and 'order'. And there are no definitions for the words 'judgment' or 'order'

in the CJA. Neither is there any definition for any of those words in the RHC. In any event, no conflicting definitions should be expected in view of s. 4 of the CJA which provides:

> 4. Provision to prevent conflict of laws.
>
> In the event of inconsistency or conflict between this Act and any other written law other than the Constitution in force at the commencement of this Act the provisions of this Act shall prevail.

Thus, I would think that resort should be made to the relevant definition as available in the CJA. But there only the word 'decision' has been ascribed with a meaning. **As such, one may argue that the words 'judgment, order or decision' as found in the said O. 56 r. 1 of the RHC should be read disjunctively** thereby allowing appeal to proceed against any judgment or order made by the registrar regardless of it being interlocutory or final in nature. *However, if that approach is adopted then the very mischief, that is the filtration of appeals, probably intended to be addressed when amending the definition of the word 'decision' under s. 3 of the CJA, would be missed. Thus, I do not think the 'disjunctive' approach is in tandem with the legislative intent*. Further, the meaning of words grouped together should 'take as it were their colour from each other'.

(emphasis added)

[38] See also *OCBC Bank (Malaysia) Bhd v. Stephen Hansford Sales (M) Sdn Bhd & Ors And Another Suit* [2004] 1 CLJ 51 (HC).

[39] Therefore, based on all of the above, it is my judgment in the present case that for a 'judgment', 'order' or 'decision' to be appealable in pursuant to O. 56 r. 1(1) of the ROC 2012, the said 'judgment', 'order' or 'decision' must be that which finally dispose of the rights of the parties and it must not be any ruling made in the course of a trial, hearing or any cause or matter.

[40] The same approach above has been taken by the courts in several cases, namely *OCBC Bank (Malaysia) Bhd v. Stephen Hansford Sales (M) Sdn Bhd & Ors & Anor Suit* (*supra*), *Takang Timber Sdn Bhd v. Syarikat Tingan Lumber Sdn Bhd* [2001] 7 CLJ 641 (HC), and *Re Abu Bakar PC Kuaya; Ex Parte Navaratnam Sivasamboo* [2002] 6 CLJ 381; [2002] 7 MLJ 528; (HC).

[41] In the present case, I find that the 17 September 2019 direction is not a 'judgment', 'order' or 'decision' which finally dispose of the rights of the parties. The rights and liabilities of the parties has been determined during the said foreclosure proceeding (and the appeals emanated therefrom). The main purpose of the 17 September 2019 direction was to proceed with the auction of the said land pursuant to the said order which did not take place on the earlier designated date due to the Court of Appeal's order for stay.

[42] Therefore, based on the above, I agree with learned counsel for the plaintiff and I am of the considered view that the 17 September 2019 direction is not an appealable judgment, order or decision in light of O. 56 r. 1(1) of the ROC 2012. As such, I hold that this appeal is incompetent and should be dismissed on this basis alone without even going onto the merits.

Second Issue: Whether The 2017 Practice Direction Is Applicable To This Case And Whether Any Non-compliance Thereto Has Prejudiced The Defendant Or Has Resulted In Any Substantial Miscarriage Of Justice Against The Defendant

[43] For the sake of completeness, I now turn to consider this issue.

[44] It was strenuously submitted by learned counsel for the defendant that the 17 September 2019 direction was made in error. According to learned counsel for the defendant, this was due to the fact that pursuant to the 2017 Practice Direction, the plaintiff must file a fresh application for directions in relation to the auction of the said land.

[45] The relevant part of the 2017 Practice Direction is as follows:

> 5. Pemfailan
>
> 5.1. Notis permohonan bagi pelaksanaan berkaitan dengan prosiding halang tebus di bawah seksyen 254 dan 256 Kanun Tanah Negara 1965 hendaklah difailkan dan didaftarkan di bawah Kod 38.
>
> 5.2 Notis Permohonan hendaklah difailkan bersama Afidavi Sokongan yang melampirkan Laporan Penilaian Terkini dan Perintah Jualan Termeterai atau Perintah Jualan Yang Diakui Sah.
>
> 5.3 Plaintif hendaklah memasukkan butir-butir hartanah yang tepat dan memuat naik gambar hartanah ke dalam Sistem e-Filing.
>
> 5.4 Mahkamah hendaklah memproses Notis Permohonan Plaintif dalam tempoh dua (2) hari bekerja dari tarikh pemfailan.
>
> 5.5 Plaintif hendaklah memfailkan Notis Permohonan yang baru apabila lelongan awam terdahulu dibatalkan.
>
> …
>
> 8. Penetapan Tarikh Lelongan Awam
>
> 8.1 Tarikh lelong yang telah ditetapkan oleh YA Hakim semasa perintah jualan hendaklah dikekalkan sekiranya tarikh tersebu belum luput.
>
> 8.2 Bagi tarikh lelongan awam yang telah luput, tarikh lelongan awam baharu hendaklah ditetapkan dalam tempoh tiga puluh (30) hari dari tarikh pendengaran Notis permohonan. Walau bagaimanapun, Mahkamah mempunyai budibicara untuk menetapkan tarikh lelongan awam yang lebih panjang sekiranya difikirkan sesuai.
>
> 8.3 Jika lelongan awam gagal dijalankan pada tarikh yang ditetapkan maka perenggan 5.5 adalah terpakai.
>
> …
>
> 13. Garis Panduan
>
> Arahan ini hendaklah dibaca bersama dengan Garis Panduan yang dilampirkan.
>
> ...

16. Pembatalan Lelong Awam

(1) Lelong awam akan dibatalkan dalam keadaan berikut:

(a) tiada Pembida berdaftar;

(b) tiada bidaan dilakukan oleh Pembida berdaftar;

(c) atas permohonan penangguhan atau pembatalan oleh pihak Plaintif secara bertulis;

(d) kertas kausa tidak teratur;

(e) terdapat perintah penggantungan pelaksanaan;

(f) atas alasan Defendan telah membayar hutang sepenuhnya pada atau sebelum lelongan awam dijalankan; atau

(g) dalam apa-apa keadaan lain yang dianggap munasabah.

(2) Apa-apa pembatalan lelongan awam yang dibuat di bawah perenggan 16(1) di atas, pihak Plaintif hendaklah memfailkan Notis Permohonan menggunakan nombor pendaftaran Kod 38 yang baharu.

(3) Deposit Pelaksanaan seperti di perenggan 2 akan dipulangkan kepada pihak Plaintif setelah menerima permohonan secara bertulis.

17. Penangguhan Lelong Awam

(1) Pendaftar boleh menangguhkan lelong awam sekiranya terdapat gangguan teknikal pada hari lelongan awam tersebut.

(2) Sekiranya lelongan awam ditangguhkan:

(a) Makluman hendaklah dibuat melalui hebahan di laman web e-Lelong dan makluman kepada pihak-pihak yang terlibat sahaja; dan

(b) Menjadualkan semula sesi lelongan awam dan hantar notis makluman kepada pihak-pihak yang terlibat sahaja.

[46] The 2017 Practice Direction was issued by the Chief Judge of Malaya, pursuant to O. 92 r. 3B of the ROC 2012 which provides that:

Practice directions (O. 92, r. 3B)

3B. The Chief Judge after consulting the Chief Justice may issue such practice directions as may be necessary for the better carrying out or giving effect to the provisions of these Rules.

[47] On this issue, I am guided by the majority judgment in the Federal Court case of *Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd* [2002] 1 CLJ 645 where it was held that practice directions should be complied with insofar as they are not in conflict, superseding or deviating substantially from the statutory rules of courts. In the words of Steve Shim CJ (Sabah & Sarawak) (as he then was):

In *Ooi Bee Tat v. Tan Ah Chim & Sons Sdn Bhd & Anor* [1995] 4 CLJ 484, it was held that Practice Directions were effected for administrative purposes. I accept that as a correct statement of the law. Undoubtedly,

A they provide guidelines for a more effective implementation of the rules of court. They seek to clarify or highlight such rules. They may even, to some extent, modify them, but certainly they are not meant to supersede or deviate from court rules which have been statutorily laid down. To do so would, in my view, be a negation of the authority of Parliament which has conferred powers upon the Rules Committee under s. 17 Courts of
B Judicature Act 1964 to make rules of court.

It is true that the Chief Justice has been empowered under r. 110 Rules of the Federal Court 1995 to issue Practice Directions. So has the President of the Court of Appeal under r. 77 Rules of the Court of Appeal. Nevertheless, it cannot have been in the contemplation of Parliament that
C they can issue Practice Directions in direct conflict with procedural rules of court which have been statutorily laid down. *In my view, to the extent that such Practice Directions are in conflict, in the sense of superseding or deviating substantially from statutory rules of court, they are of no legal effect whatsoever. Of course, once Practice Directions have been properly and legally issued, they must be complied with. I believe that to be trite*: (see *Yeo Yoo Teik v. Jemaah Pengadilan*
D *Sewa, P Pinang & Anor* [1996] 2 CLJ 628; *Raja Guppal Ramasamy v. Sagaran Pakiam* [1999] 2 CLJ 972).

(emphasis added)

[48] At the outset, it would seem that the plaintiff should file a fresh
E application for directions since the auction of the said land did not take place as a result of the Court of Appeal's order for stay.

[49] However, it must also be borne in mind that a practice direction is only a direction for administrative purposes. In the case of *Ooi Bee Tat v. Tan Ah Chim & Sons Sdn Bhd & Anor and Another Appeal* [1995] 4 CLJ 484; [1995]
F 3 MLJ 465; Zakaria M Yatim JCA (as he then was) in delivering the judgment of the Court of Appeal held as follows:

We are of the view that the standing orders referred to in the above judgment are not the same as Practice Notes or Practice Directions. According to the Supreme Court Practice, 1993, Vol. 2, page 1513 the
G standing orders relating to the Judicial Proceedings in the House of Lords are made pursuant to the relevant acts, and are agreed to, on motion, by the House itself. The relevant Acts are the Appellate Jurisdiction Acts 1876, 1887; the Administration of Justice (Appeals) Act 1935; the Administration of Justice Act 1969 and the Judicature (Northern Ireland) Act 1978. *The standing orders are therefore similar to what we generally call*
H *subsidiary legislation in this country and have the same status as the Rules of the Supreme Court, or the Rules of the High Court.*

In the present case, when the Deputy Registrar refused the extension of time she was merely carrying out an administrative duty pursuant to the Practice Direction. Practice Directions are intended to be no more than a direction for administrative purpose. Jayasankaran v. Public Prosecutor [1982] CLJ 478 380. Under O. 62(7)
I the authority empowered to grant an extension of time is the Court. Section 2 of the Rules defines "Court" to mean the Supreme Court or a Judge of that Court. Therefore any application for extension of time to

file the record of appeal must be made to the Supreme Court or the Judge of that Court. Order 62(7) provides that the memorandum and record of appeal shall be filed at the place where the appeal was entered within six weeks after the entry of the appeal or within such further time as the Court may allow.

(emphasis added)

[50] As the law has it, the function of this court is to observe overriding interest of overall justice and not just mere technical non-compliance with any rules of court and even more so, any administrative directions. Order 1A of the ROC 2012 has been clearly worded as follows:

Order 1A. Court or judge shall have regard to justice

Regard shall be to justice (O. 1A)

In administering these Rules, the Court or a Judge shall have regard to the overriding interest of justice and not only to the technical non-compliance with these Rules.

[51] I adopt the approach taken by the Court of Appeal in the case of *OCBC Bank (Malaysia) Bhd v. Lim Hock Kok & Anor* [2017] 9 CLJ 454 where Court of Appeal had taken into account the question of whether any non-compliance with a practice direction had caused any prejudice to the other party or substantial miscarriage of justice. His Lordship Idris Harun JCA (now FCJ) in delivering the judgment of the Court of Appeal held that:

[3] We accept that the appellant did not comply with Practice Direction No. 1 of 2011, however, we find that such non-compliance is merely in respect of the number of pages allowed for each volume of the record of appeal whereby the record of appeal filed in respect of the present appeal had exceeded the permissible number of pages prescribed under the said practice direction. One thing seems to be clear, that is that, judicial authorities show that practice directions are effected for administrative purposes, but it is trite that once practice directions have been properly and legally issued, they must be complied with (*Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd* [2002] 1 CLJ 645). For the Court of Appeal, the President of the Court of Appeal is empowered by r. 77 of the Rules of the Court of Appeal 1994 to issue practice directions. In this case, in our judgment, the record of appeal has exceeded the prescribed number of pages by only 100 pages. *The non-compliance in this regard is of nature which in our opinion is so insignificant and trivial that it cannot be said that the respondents have been prejudiced in any way. There is clearly no substantial miscarriage of justice involved. Moreover, by virtue of r. 102 of the Rules of the Court of Appeal 1994, non-compliance with any rule of practice shall not render any proceedings void unless the court so directs and indeed we have no reason whatsoever to so direct. We are also mindful that under O. 1A of the Rules of Court 2012, the court or a judge shall have regard to the justice of the case and not only to the technical compliance of any rules.*

(emphasis added)

[52] Similarly in the present case, I hold that the non-compliance of the plaintiff with the 2017 Practice Direction did not cause any substantial miscarriage of justice and did not prejudice the defendant in any way based on the following reasons.

[53] Firstly, the substantial issues regarding the rights and liabilities of the parties *via* the said foreclosure proceeding have been determined by the courts up until the Federal Court (note that the Federal Court had dismissed the defendant's application for leave to appeal to the Federal Court). In fact, the Court of Appeal and the Federal Court did not quash the said order for sale which has previously been granted.

[54] Secondly, as a result of the above, the defendant no longer has any avenue to dispute or raise any issues which could potentially affect its rights which has been litigated. Any attempt by the defendant to raise any issue which has been litigated and should have and could have been brought up in the proceedings before this would naturally be estopped by the principle of *res judicata*.

[55] Thirdly, it is trite that the court has the power to make other orders after the making of an order for sale. It is pertinent to note at this juncture that an order for a change in the reserve price or a change in the action sale dates are only consequential to the said order for sale which is already final. The Supreme Court in *MUI Bank v. Cheam Kim Yu* [1992] 4 CLJ 2229; [1992] 1 CLJ (Rep) 222 through Harun Hashim SCJ (as he then was) in delivering the judgment of the court stated that:

> True, after making an order for sale, the judge has the power to make other orders, including changes in the reserve price and the auction sale dates, but such orders are consequential to the order for sale. The point here is that the order for sale is a final order unless appealed against. Once the order for sale is made, drawn up and perfected, as here, the learned judge is *functus officio* and therefore has no power to set aside the order for sale.

[56] See also the case of *Perwira Affin Bank Bhd v. Tan Ah Tong* [2003] 2 CLJ 320 (HC).

[57] Therefore, I am of the opinion that even if the plaintiff is to file a fresh application in the present case, the only matter for this court's determination will be the fixing of the new auction date. Other ancillary directions in the said order such as the reserve price of the said land would be maintained as the said order has never been enforced.

[58] If I may pause here to add that by taking into account specifically the surrounding facts in the present case, I find that the defendant had filed various suits, applications and appeals to prevent the plaintiff from proceeding with the auction of the said land. I am of the considered opinion

that should the 17 September 2019 direction be quashed for technical non-compliance on the part of the plaintiff, it would open the door for abuse of the court's process. The defendant may keep on filing appeals and applications for stay of execution in each application for directions obtained by the plaintiff which has been done prior to this. As a result, of any appeal or application for stay of execution which may be subsequently filed by the defendant or allowed by the courts, the auction of the said land cannot proceed. Is the plaintiff then required to file a fresh application for directions each and every time just to fix a new auction date? I believe the answer should be in the negative. It is clear that the inherent powers of this court is to prevent any injustice and to prevent any abuse of the process of the court (O. 92 r. 4 of the ROC 2012).This court shall not tolerate any abuse of the court's process under such circumstances.

[59] Based on the foregoing reasons, I find that in the overall interest of justice, the plaintiff's non-compliance with the 2017 Practice Direction did not cause any substantial miscarriage of justice and did not prejudice the defendant. Therefore, I find that the 17 September 2019 direction has been rightly issued by the learned Deputy Registrar.

Conclusion

[60] In a nutshell, based on all of the above, and after hearing the submissions of both parties, I agree with the submission by learned counsel for the plaintiff. As such, the defendant's appeal (encl. 73) is dismissed and the 17 September 2019 direction made by the learned Deputy Registrar is hereby affirmed. Costs of RM3,000 to be paid by the defendant to the plaintiff subject to allocator. No order as to stay.